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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 CAROLE SMITH,

4 Plaintiff,

New York, N.Y.

5 v.

22 Civ. 4389 (DLC)

6 GLAAD, INC.,

7 Defendant.

8 -----x

Teleconference

9 June 1, 2023

3:00 p.m.

10 Before:

11 HON. DENISE COTE,

12 District Judge

13
14 APPEARANCES

15
16 MENKEN SIMPSON & ROZGER, LLP

17 Attorneys for Plaintiff

18 BY: BRUCE E. MENKEN

19 SHEPPARD MULLIN RICHTER & HAMPTON

20 Attorneys for Defendant

21 BY: BRIAN D. MURPHY

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1 (The court and parties appearing telephonically)

2 THE COURT: Good afternoon. This is Judge Cote.
3 Smith v. GLAAD, 22 Civ. 4389.

4 Is plaintiff's counsel ready to proceed?

5 MR. MENKEN: Yes. Good afternoon, your Honor. It's
6 Bruce Menken, Menken Simpson & Rozger.

7 THE COURT: Thank you.

8 Is counsel for the defendant ready to proceed?

9 MR. MURPHY: Yes, your Honor. Good afternoon. This
10 is Brian Murphy from Sheppard Mullin Richter & Hampton.

11 THE COURT: Thank you. I have two letters. The first
12 one was from defense counsel dated today, and it raises an
13 issue about whether a deposition of an additional person needs
14 to be taken. That's the deposition of Ms. Marra. As I
15 understand it, the plaintiff seeks to take Ms. Marra's
16 deposition.

17 Then I received just a few minutes ago a letter from
18 plaintiff's counsel with respect to a request for certain
19 telephone records. We'll deal with that in a moment. Let's
20 just deal with the deposition issue first.

21 I have defendant's opposition to the plaintiff's
22 request to take Ms. Marra's deposition. So Mr. Menken, I want
23 to give you an opportunity to be heard.

24 MR. MENKEN: Sure. Your Honor, first let me say that
25 the proposal to depose Ms. Marra was made several months ago.

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1 I spoke to Mr. Murphy about it, and there was initially not an
2 objection. Then there was an objection after I noticed the
3 deposition.

4 And I might add that as a sort of a compromise
5 courtesy, I let Mr. Murphy know that the deposition would be
6 remote, rather than in person, which is the way the other three
7 depositions were conducted. And also we would limit it to 90
8 minutes. And I told him that plaintiff would not be present
9 during that remote deposition.

10 And then there is a reference in Mr. Murphy's letter
11 that my client was agitated and or some description that there
12 might be some problem if Ms. Marra were deposed and my client
13 were present. My client's not really angry. She's just really
14 committed and upset. And to alleviate the potential concern,
15 she's not going to be present during the other 90-minute remote
16 deposition that we're seeking.

17 Significantly, there are three or four issues that I'd
18 like to question Ms. Marra about, that again, I think I could
19 obtain that information in short order. One is a really
20 important question, which is whether she was asked if she
21 considers herself queer. This was a question that the chief
22 strategy officer Grant Schneider asked my client not once, but
23 twice, during her fourth job interview.

24 Taking a step back, your Honor, the reason why the
25 questions asked by the employer are important in a case like

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1 this, which is a failure to hire case, is that, as you know,
2 plaintiff's got to show intent to discriminate, and courts have
3 obviously held that showing intent can be a challenge at some
4 times, and it could be slippery at times in discovery cases.

5 So therefore, the questions that an employer asks a
6 witness clearly reflects the intent of the employer and what
7 criteria it deems important when deciding who to hire and who
8 not to hire.

9 So when the chief strategy officer of -- the
10 employer's chief strategy officer asks an applicant for a job,
11 who has three prior interviews, if she considers herself queer,
12 twice, that's quite telling. If he doesn't ask a person who is
13 20 to 25 years younger, that's also quite telling.

14 We need to be able to ask Ms. Marra what she
15 remembered about her interview by Mr. Schneider, and whether he
16 asked her that question.

17 So that's the first -- that's the most important part
18 of the proffer in the deposition of Ms. Marra.

19 There is also testimony that Ms. Pointer, the decision
20 maker for GLAAD, considered Ms. Marra's international
21 experience as a factor in deciding to hire Ms. Marra and not
22 Ms. Smith. Beside the fact it's not in the job listing, and it
23 is not in the job description, we still want to ask Ms. Marra
24 whether she had international experience or international
25 research experience.

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1 Lastly, there is a certain specific period of time,
2 November 30, when my client was interviewed by the chief
3 strategy officer and asked that unlawful question twice, and
4 December 3 when I believe there was an oral communication
5 between the employer and Ms. Marra where there was a new offer
6 conveyed to Ms. Marra, and she then verbally accepted the job.

7 It's important to note that the day before my client
8 was interviewed on November 30 by the chief strategy officer,
9 Ms. Marra rejected GLAAD's job offer. So, as of November 30,
10 there was no job offer on the table when Mr. Schneider, the
11 chief strategy officer, asked my client that illegal question
12 not once, but twice.

13 So, again, we believe that this deposition not only is
14 in good faith, and seeks to elicit critical information that
15 we're entitled to.

16 THE COURT: Before I turn to Mr. Murphy, Mr. Menken,
17 do you have Ms. Marra's résumé or application?

18 MR. MENKEN: We have her résumé.

19 THE COURT: And it does not list international
20 experience?

21 MR. MENKEN: Correct, it does not.

22 THE COURT: So you have no basis from the documents to
23 understand that Ms. Marra had any international experience?

24 MR. MENKEN: That's correct. However, there was a
25 presentation during the interview process that Ms. Marra gave

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1 to Mr. Schneider, the chief strategy officer, and Ms. Pointer,
2 the decision maker, and according to Ms. Pointer's testimony,
3 Ms. Marra said that she had international experience, and that
4 was a factor that Ms. Pointer and GLAAD took into consideration
5 when making a decision to offer and hire Ms. Marra.

6 THE COURT: Thank you.

7 Mr. Murphy.

8 MR. MURPHY: Thank you, Judge. So I'll take those in
9 order.

10 First, Mr. Menken would like to explore whether
11 Ms. Marra was asked if she was queer during her interview with
12 Grant Schneider. Mr. Schneider has already testified -- two
13 things. Mr. Schneider has acknowledged having asked the
14 question during plaintiff's interview, and it is slightly
15 outside the scope of what we discussed, but he had a lot of
16 explanation for it and how it was contextual, given that GLAAD
17 is an LGBTQ organization advancing LGBTQ interests.

18 Two, he already acknowledged that he did not ask that
19 question of any other applicants, because it was not in the
20 context of the conversation with any other applicant, including
21 Tristan Marra.

22 So, it is undisputed as it stands that she was not
23 asked that question. And if Mr. Menken's goal is to explore or
24 to establish, I guess, differential treatment as between the
25 two, well, it is established, based upon the current record, at

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1 least vis-a-vis the asking of that question. So I don't see
2 how that is relevant. I do think if that is ultimately
3 important to Mr. Menken, that could be answered through much
4 less intrusive or burdensome means, such as an interrogatory.
5 But that remains to be seen.

6 Two, on the issue of experience, and I don't have the
7 full transcript in front of me right now, but a few points I'd
8 like to raise. One, as set forth in our letter, all three
9 witnesses that have already been deposed have spoken glowingly
10 about plaintiff's experience. She had certainly
11 chronologically or orally much more experience just in the work
12 force and in media and as well as involvement with LGBTQ
13 issues, because she's been in the work force longer. The
14 testimony is uniform that she was an exceptionally qualified
15 candidate.

16 Two, Ms. Pointer in particular and I can't recall --

17 THE COURT: Excuse me, Mr. Murphy, one second. You
18 referred to the plaintiff having a lot more experience. Did
19 you mean to refer to the plaintiff or Ms. Marra?

20 MR. MURPHY: No, I meant to refer to the plaintiff.

21 THE COURT: Thank you.

22 MR. MURPHY: Yes. It is a long way of saying there is
23 no dispute in this case that the plaintiff was qualified for
24 the position. The ultimate issue, and there is extensive
25 testimony on this from Ms. Pointer, the decision maker, is to

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1 how she evaluated the different types of experience they had.
2 One component of which was Ms. Marra's employment with one of
3 her prior employers. She had done some research concerning
4 international global trends. Again, I'm not aware off the top
5 of my head of the specific issue, but pertaining to global
6 trends pertaining to the LGBTQ movement. So, there is
7 extensive testimony, and I think that's really the relevant
8 issue that Tristan Marra can provide no testimony about, which
9 is how did GLAAD evaluate the qualifications. What did GLAAD
10 consider important. Not whether she had it or not. And
11 Tristan can provide -- Ms. Marra can provide absolutely no
12 testimony on that, because it is undisputed she was not party
13 to the process by which her candidacy or plaintiff's candidacy
14 was evaluated.

15 The third proposed area of questioning is around I
16 guess the timeline of an offer and an acceptance, and I think
17 Mr. Menken is being very precise, but I think it creates a
18 misleading view of the world.

19 So, what had occurred from a timing perspective is
20 that plaintiff was interviewed after GLAAD had narrowed down a
21 list of candidates to some proposed finalists. The plaintiff
22 underwent two interviews before the third allegedly problematic
23 interview on November 30. GLAAD extended, I think it was eight
24 days before this interview, November 22, extended a verbal
25 offer of employment to Ms. Marra. That offer was not accepted

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1 until approximately December 3. What happened in the interim
2 was not a rejection of the offer or a withdrawal of the offer.
3 What happened was a salary negotiation. While Mr. Menken is
4 correct that the original terms of the proposed offer were
5 rejected, they were rejected along with the message, hey, I'm
6 interested in this position, I need a couple more dollars
7 before I accept. So, that is what transpired there.

8 I see again, since there is no dispute that the offer,
9 you know, GLAAD came to the decision, and that's what this case
10 is about, was the decision problematic. GLAAD came to the
11 decision to extend an offer to the successful candidate seven
12 or eight days before the interview occurred where the allegedly
13 problematic statements were made. That's all that's relevant.
14 Whether there was salary negotiation or whether the deal was
15 not consummated until three or two days after this allegedly
16 problematic interview is irrelevant.

17 And I don't believe, in fact, there is no testimony
18 that Ms. Marra can provide that would be anything other than
19 cumulative at best, since this all exists in e-mail form. We
20 have e-mail confirmations of when the offer was made, we have
21 e-mail confirmations of the salary negotiation, and we have
22 e-mail confirmations of the acceptance of the offer.

23 So I think it is problematic or unnecessary to depose
24 Ms. Marra for at best cumulative information.

25 So, your Honor, that's my response to the points

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1 raised by Mr. Menken. I'm happy to address some of the other
2 concerns we have, but I don't want to go too far afield.

3 THE COURT: So I think let's stay focused on whether
4 or not the plaintiff can take Ms. Marra's deposition.

5 And Mr. Menken, it seems to me the only potentially
6 relevant issue here is whether or not Ms. Marra had
7 international experience, and I'll let you put an interrogatory
8 to her with respect to whether or not she discussed any
9 international experience during the interview process, such
10 that you would be able to know whether or not the decision
11 makers were being frank with you when they said they took that
12 into account. But I don't think there is a need for another
13 deposition.

14 MR. MENKEN: Your Honor, I want to add one thing, your
15 Honor, which is that Mr. Murphy just said in argument, okay,
16 that Mr. Schneider said he did not ask Ms. Marra the queer
17 question. That's not what his testimony was. His testimony
18 was he did not remember. He did not know. So, if in fact the
19 Court is prohibiting me from deposing Ms. Marra, at a minimum,
20 maybe the defendant wants to stipulate in a document, in an
21 affidavit that GLAAD or any of its representatives did not ask
22 Tristan Marra whether she considered herself queer.

23 THE COURT: So, let me ask you one question,
24 Mr. Murphy. Are you planning to call Ms. Marra as a trial
25 witness?

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1 MR. MURPHY: No, your Honor. Not at the present time.

2 THE COURT: Okay. So I'm going to let the plaintiff
3 depose Ms. Marra, should the defendant decide to call Ms. Marra
4 as a trial witness.

5 So, we have a court reporter here, so if things
6 change, and in the pretrial order the defendant identifies
7 Ms. Marra as a trial witness, I am going to give the plaintiff
8 an opportunity to take her deposition at that time.

9 Let's turn to this other issue about the subpoena for
10 phone records. Mr. Murphy, have you had a chance to look at
11 Mr. Menken's letter of today about the six-day period for phone
12 records for two individuals?

13 MR. MURPHY: Yes, your Honor, and I told Mr. Menken in
14 advance that I wouldn't object to it being brought up on this
15 conference, because he and I have discussed the issue recently.

16 THE COURT: Did you wish to be heard, Mr. Murphy, on
17 that?

18 MR. MURPHY: Yes, your Honor. Briefly.

19 So again, there is the timeline I referenced before I
20 think is relevant. Just by way of reminder, plaintiff alleges
21 that the problematic question was asked in an interview with
22 Grant Schneider on November 30, and the ultimate allegation is
23 her response to that question informed GLAAD's decision somehow
24 in not hiring her.

25 However, and I don't have every transcript up in front

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1 of me, and, Bruce, if I'm incorrect, I apologize. Please
2 correct me. But I do believe all three witnesses have already
3 testified that none of them communicated with Grant Schneider
4 by phone, text message, or otherwise, following that
5 November 30 meeting, other than one witness saying, I believe
6 Ms. Pointer saying, she asked him how did it go, and he said
7 the plaintiff is a great candidate. Something very
8 perfunctory.

9 They've all been consistent in their sworn testimony.
10 They did not have any text, any e-mail correspondence about the
11 substance of this allegedly problematic interview.

12 And from where we stand, that's a big problem for
13 plaintiff's case, because if this interview did not play any
14 role in the decision-making process, if no one was aware of it,
15 then of course it could not have influenced the decision.

16 Frankly, from GLAAD's view, we already know or believe
17 that it could not have influenced GLAAD's decision-making
18 process, because it extended an offer to Marra eight days
19 before this allegedly problematic interview. So, we can put
20 that aside though, and put aside that the testimony is uniform.

21 There have also been RFPs, requests for production, in
22 this case asking for all communications -- text, e-mail,
23 otherwise -- related to the allegations in the complaint,
24 related to plaintiff, related to the interview with Grant
25 Schneider. And we have searched. I haven't physically picked

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1 up anyone's phones, but I have been working with my client for
2 months at this point, I've represented them for years on a pro
3 bono basis, and I have every confidence they took my direction
4 and searched their phones for records, text messages that would
5 have been responsive to requests for production that are
6 ultimately the same as these interrogatories, for the most
7 part.

8 We've represented now in this case through written
9 discovery responses that we don't have those. They are not in
10 our possession, meaning, as far as we know, they don't exist.
11 Certainly I don't have them. And the client's represented they
12 don't.

13 So now, for the interrogatories, plaintiff wants
14 provider information I think because he simply doesn't believe
15 us. And Mr. Menken and I get along just fine in this case,
16 we're very courteous with each other. But ultimately, that can
17 be the only explanation for these interrogatories is he doesn't
18 believe what the witnesses have testified to under oath and the
19 representations I've made as an attorney admitted before this
20 court in responding to other discovery requests.

21 So, I think it's belaboring the point. It is a bit
22 intrusive to seek the personal phone records through the
23 providers, whatever the mechanism ultimately he intends to
24 proceed by, to challenge something that at this point is
25 undisputed both by the witnesses and by me as their

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1 representative that those records don't exist.

2 THE COURT: So Mr. Menken, did you want to be heard?

3 MR. MENKEN: Please. Your Honor, first with regard to
4 the first issue and the deposition. For summary judgment
5 purposes, I think I need a stipulation to sit for the
6 defendants to sign that Ms. Marra was not asked the queer
7 question. And I'm hoping the Court will so order that.

8 THE COURT: No, I'm not going to require the parties
9 to stipulate. If there is a summary judgment motion, you can
10 make your argument. Thank you. But, we've moved past that.

11 I'm sorry?

12 MR. MENKEN: With regards to the interrogatories, I'd
13 like to respond, if I may.

14 THE COURT: Yes.

15 MR. MENKEN: Okay. Thank you.

16 Mr. Murphy and I have been around long enough to know
17 that just because a witness testifies to something and says
18 something, does not necessarily mean it's accurate, does not
19 necessarily mean that that witness's memory is on point.

20 So, with regard to the interrogatories, they are not
21 asked to harass, and they are completely relevant and critical
22 to the case. Mr. Schneider was personally asked by Ms. Pointer
23 to interview my client. Mr. Schneider was intimately involved
24 in interviewing the other candidate, Ms. Marra. Okay. And on
25 November 30, he asked my client a question that's prohibited

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1 under documents produced by GLAAD when it describes what is
2 proper questions, what are proper questions for an interview.
3 So, he admits asking that question on November 30, and from
4 November 30 to December 3, we're supposed to believe that he
5 and Ms. Pointer had no communication at all.

6 And the reason why it's obvious that he had had some
7 communication is because on Monday, December 6, at 9:30 in the
8 morning, the first workday after there was a verbal offer and
9 acceptance to Ms. Marra, Ms. Pointer sends a private personal
10 e-mail to Mr. Schneider saying, great news, Tristan accepted
11 the job as head of research. Woo-hoo, thanks for the support,
12 guidance, and constant encouragement. Grateful. More to come.

13 It really is strong evidence to show that between
14 November 30 and December 3, Mr. Schneider communicated with
15 Ms. Pointer and provided her his feelings and opinion on my
16 client, Carole Smith's candidacy for the job. And considering
17 he is the chief strategy officer, he's a part of the executive
18 team, he was specifically asked by Ms. Pointer to interview my
19 client, I can't believe that Ms. Pointer would not want to know
20 what Mr. Schneider felt about my client, and what his opinion
21 was of her candidacy. It just doesn't make any sense, it's
22 preposterous, and of course they are going to testify that he
23 didn't call her. And I don't want to suggest that someone is
24 lying, but it might very well be that. Maybe he forgot.

25 THE COURT: So --

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1 MR. MENKEN: So it tests that testimony. I have a
2 carefully crafted and tailored interrogatory, and all I am
3 going to get -- I'm not going to get the narrative of the call
4 or the narrative of the text. It is just going to be an
5 indication of whether there was a call between the two parties,
6 or calls, and whether there were texts between the parties.

7 THE COURT: So Mr. Menken, I think you put your finger
8 on the problem, that these are all people who work in the same
9 business together and rely on each other. The phone records
10 that you seek aren't going to reveal what the substance of any
11 conversation was, even if they had contact with each other.
12 The message you described of December 6 does not indicate that
13 there was any communication in the preceding days or any
14 particular period of time.

15 Counsel are able to argue inferences to the jury, if
16 it gets to that point. But any substantive communications, to
17 the extent that a record exists, you'll receive that in
18 discovery. I am not going to require the parties to turn over
19 their personal identifying information to the plaintiff or
20 allow you to get their phone records for that, even though it
21 is a limited period of time.

22 Counsel, I know you've worked hard with respect to
23 discovery so far. I'm glad you're towards the very end of this
24 process. You have a schedule for any summary judgment motion.

25 Let me ask you, Mr. Murphy, do you expect to bring

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1 such a motion?

2 MR. MURPHY: I believe so, your Honor, as it stands
3 right now.

4 THE COURT: Okay. If you decide not to, that's just
5 fine. I don't expect the plaintiff to bring a summary judgment
6 motion. In these cases usually it is the defendant, but let's
7 set a schedule.

8 If there is going to be no summary judgment motion,
9 please let me know by July 21, and then we'll get out a further
10 order with respect to a pretrial order schedule, so we can get
11 this case tried efficiently and quickly for you.

12 Thank you all, counsel. I hope you have a very good
13 summer. Good luck.

14 MR. MENKEN: Thank you.

15 MR. MURPHY: Thank you.

16 (Adjourned)